Petition

81-1911

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIM NICOLL
Petitioner,

against

UNITED STATES OF AMERICA
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEALS, UNIT B

PETITION FOR A WRIT OF CERTIORARI

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March 8, 1982

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I
QUESTION PRESENTED

Did the District Court and the Court of Appeals properly rule that venue did lie within the Northern District of Georgia when there was no evidence in the record of any contact by the Petitioner to the district, and when there was no evidence of any overt act occurring within the district subsequent to the formation of the conspiratorial agreement?

Alternatively phrased: Can acts performed within the district by a co-conspirator be imputed to the Petitioner for the purpose of venue when the conspiracy was not shown to have been in existence at the time of those acts?

II

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IV
OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, Unit B, affirming the judgment of conviction was rendered on January 7, 1982, and is reported at 664 F.2d 1308 (5th Cir. 1982). (See Appendix) The District Court issued no written opinion.

V
JURISDICTION

The judgment of the Court of Appeals was rendered on January 7, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

VI
STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, Rule 18, provides, in pertinent part, under the heading of "venue":

Except as otherwise permitted by statute or by these Rules, the prosecution shall be had in a District in which the offense was committed.

The United States Code, 18 U.S.C. §3237, titled "Offenses begun in one district and completed in another", states:

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

VII
STATEMENT OF THE FACTS

On May 1, 1979, a Grand Jury impanelled in the Northern District of Georgia returned a true bill of indictment against the Petitioner and co-defendants, James Malcolm Henry and Jane Doe a/k/a Kathy a/k/a Seeka. They were charged with having conspired to possess quantities of cocaine hydrochloride with the intent to distribute in violation of 21 U.S.C. §§841(a)(1)[1] and 846[2].

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1. §841(a)(1) states:
   (a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, dispense or possess with intent to manufacture, distribute or dispense, a controlled substance ...
2. §846 states:

The Petitioner's Pre-Trial Motion for a Change of Venue was denied. The Petitioner's initial trial resulted in a mis-trial upon his motion asserting that the co-conspirator's declarations had been improperly admitted.

At the beginning of his second trial, Petitioner's renewed motion for a change of venue was denied. Following a three (3) day trial, the Defendant was found guilty. The evidence presented at trial when taken in a light most favorable to the Respondent, established the following:

On or about August 2, 1978, Dr. Drank Ader, a government informant, called the Atlanta Division of the Drug Enforcement Administration (DEA) with information of alleged narcotic transactions involving Petitioner's co-defendant, Jim Henry. Ader informed DEA Agent Melvin Smith that the scheme was to distribute cocaine. On August 9, after several unsuccessful attempts by phone, Ader and Smith, posing as drug suppliers, contacted Henry by phone in Atlanta. Henry indicated an interest in purchasing cocaine for buyers in Texas and Tennessee. After a short discussion on how the transaction could be handled and refusing to provide Henry with a sample, they all agreed to meet later that evening at an Atlanta restaurant[3].

At the meeting that evening, Ader, accompanied by DEA Agent Tyron Yarn, informed Henry that Yarn was a representative of Ader's source. After a short discussion on how much Yarn's organization could provide, and how the transaction could be handled,

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(a) Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine ..., the commission of which was the object of the attempt or conspiracy.

3. The District Court took notice of the fact that Atlanta was in the Northern District of Georgia.

Henry informed Ader that he, Ader, would need to meet with "his contact" in Dallas. Henry then gave Ader the name and phone number of the Petitioner to call in Garland, Texas, to make the arrangements for the purchase. The following day, Smith called the Petitioner in Garland, Texas, at the number[4] supplied by Henry. After Smith introduced himself as an associate of Ader's, your Petitioner acknowledged that Henry had contacted him and that he was expecting Ader's call. During this phone conversation, as well as the other between eight and thirteen phone calls which occurred over the subsequent four months, Smith and your Petitioner attempted to reach an agreement on their proposed arrangement. On each phone call, it was Smith who called your Petitioner in either Garland or Dallas. The Petitioner never went to Atlanta, never sent anything to the district, and never placed any calls to the district.

Following a meeting in Dallas with your Petitioner, Kathy Seeka (introduced as a friend of Petitioner's who knew about cocaine), Smith and DEA Agent Gloria Woods, the proposed arrangement fell through because of Smith's refusal to provide a sample. Following Smith's further attempts to salvage the proposed arrangement, on December 18th, your Petitioner informed Smith that he was no longer interested and ceased all negotiations.

REASONS FOR GRANTING THE WRIT

The issue in the case at bar transcends the importance to this single Petitioner and presents a

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4. The number was the business number of Aloe Shine, Inc., in Garland, Texas. Henry was either a salesman with the corporation and/or part owner with Petitioner.

matter of fundamental legal significance to our lower federal courts with their ever expanding load of criminal conspiracy prosecutions. This case affords the Court an opportunity to resolve inconsistencies in the circuits regarding the application of the venue rule to conspiracy cases, a procedural matter not thoroughly addressed by this Court since its ruling in **Hyde v. United States,** 225 U.S. 347 (1912). The question of whether acts performed prior to the formation of a conspiratorial agreement by a co-conspirator can be used as a determinative basis for venue is unique and demands consideration by this Court.

This Court is charged with the primary responsibility for the proper functioning of the federal judiciary, the accomplishment of which can be achieved only by the erradication of procedural abuses such as occurred in the present case. As has been noted, the "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedures ..." **McNabb v. United States,** 318 U.S. 332, 340 (1943). Violations of those civilized standards in the lower courts require this Court to intervene. While the fact that the case below was decided incorrectly may not, per se, be enough to sway the Court to grant this writ, the resultant erosion of a Constitutional protection[5] created by abuse of the venue rule should be sufficiently persuasive to do so.

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5. Article 3 §2 clause 3 places venue (the geographical location of the trial) in the "State where the said crimes shall have been committed", while the Sixth Amendment finds the vicinage (the geographical location of the jurors) as the "state and district wherein the crime shall be been committed which district shall have been previously ascertained by law".

Fifth Circuit Decision

In affirming the Petitioner's conviction, the Fifth Circuit Court rejected, inter alia, his claim that venue did not lie within the Northern District of Georgia. The Court initially pointed out that because a conspiracy "by it's nature" can be "committed" in a number of places, *[**United States v. Cooper,** 606 F.2d 96, 97 (5th Cir. 1979), cert. denied 444 U.S. 1024 (1980)]*, " ... venue is proper in any district in which the government shows by a preponderance by the evidence that either the agreement or an overt act occurred. *[**United States v. DeLeon,** 641 F.2d 330, 336 (5th Cir. 1981). See 18 U.S.C. §3237 (...)]*." 664 F.2d at 1311. Kravitch, J., noted that, in as much as the Government's evidence showed that "co-conspirator Henry engaged in several telephone conversations within the Northern District of Georgia concerning the acquisition of cocaine and met with DEA Agents in an Atlanta restaurant to work out the details of delivery," an overt act had occurred within the Northern District and venue was proper. 664 F.2d at 1311.

Argument

In this appeal, Petitioner is not challenging the sufficiency of the evidence necessary to sustain his conviction, but is solely challenging the jurisdiction of the District Court to try him because of the improper venue. While it may be argued that the technical venue issue, when compared to the evidence of guilt, is of lesser importance, this Court has seldom adhered to that view. Because of the long standing public policy against arbitrarily sending a defendent into a strange locality to defend

himself against a powerful governmental adversary, venue questions present more than "mere matters of legal procedure." **United States v. Johnson,** 323 U.S. 273, 276, (1944) (Frankfurter, J.). The issue raised herein, therefore, is elevated to one of fundamental importance requiring review.

Because of the difficulty of determining when a conspiracy exists and where it was "committed" this Court has long recognized and warned of inherent potential abuse in labeling an alleged offense a "conspiracy".

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always "predominantly mental in composition" because it consists primarily of a meeting of minds and an intent.
>
> ... even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.

Krulewitch v. United States, 336 U.S. 440, 447-449 (1949).

In 1957, this Court again exhorted these dangers in its ruling in **Grunewald v. United States** by stating the following:

> Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the alleged pervasive and

wide sweeping nets of conspiracy prosecutions.

353 U.S. 391, 404 (1957); citing **Krulewitch v. United States,** supra. The rulings by the lower courts in this case evidence a dangerous extention of the venue rule to conspiracy cases.

The difficulty of determining where a crime has been "committed" when a conspiracy has been charged is of particular importance when a large number of defendants are involved in many counties, states or districts. The question of proper venue in a conspiracy indictment was addressed by this Court in **Hyde v. United States,** 225 U.S. 347 (1912). The Court held that a conspiracy may be "committed" in the Constitutional sense in a number of places, and prosecution may be had in any district where any overt act is performed by any of the co-conspirators.

While this Court has consistently taken the position that the venue issue is of a serious constitutional dimension, various federal courts have stretched it to unimaginable extremes and the time for review by this Court has arrived. [See **United States v. Perisco,** 520 F.Supp. 96, 102 (E.D.N.Y. 1981) (where venue was created in the district by the government's procurement of bogus writs of habeas corpus ad testificandum which required the defendant's presence in the District; holding, that " ... in many undercover cases the government creates venue because a government agent participates in the illegal transaction, and venue is present in the district where the crime occurs"); see also, **United States v. Sandy,** 605 F.2d 210 (6th Cir. 1979) (where unindicted but named co-conspirator received and mailed obscene material; holding that venue was proper in the district as to all individuals who had anything to do with obscene material, from produc-

tion to distribution and could be tried in district); see also **United States v. Spiro,** 385 F.2d 210 (7th Cir. 1967) (where defendant placed call from California to Illinois and left messages for return call; holding that Illinois was proper venue.)] The venue issue in the case at bar has been expanded to an unjustified extreme comparable to those cited herein above, mandating intervention by this Court.

Rule 18 of the Federal Rules of Criminal Procedure and 18 U.S.C. §3237 govern the venue issue in drug conspiracy cases. While venue can normally be disposed of as a preliminary matter for pretrial determination, **United States v. Sampson,** 371 U.S. 75, 78-79 (1962), it is the proof at trial which ultimately decides the issue. **United States v. Hailey,** 500 F.2d 302, 305 (8th Cir. 1974).

The proof in the trial of this case clearly shows that Petitioner's alleged co-conspirator, Henry, engaged in phone conversations with DEA agents while in Atlanta, and subsequently met with agents at an Atlanta restaurant. However, the record is completely devoid of any conspiratorial agreement between Petitioner and Henry prior to Henry's meeting with the agents in Atlanta, and no other acts are alleged to have occurred within the district. The only evidence regarding the formation of a conspiracy resulted from Petitioner's acknowledgement of having had a phone conversation with Henry the day following Henry's meeting with the agents. The record indicated no further participation by Henry in the case.

It is axiomatic to state that the essence of the crime of conspiracy is the agreement. **Iannelli v. United States,** 430 U.S. 770, 777 (1975). That agreement cannot be presumed from a silent record, and the record in the case at bar is completely silent regarding the formation of any conspiracy

prior to, or at the same time as, any of the acts which occurred in Georgia by the co-conspirator.

It is clear that the declarations of a conspirator cannot bind the co-conspirator if they are made after the conspiracy has ended. **Lutwak v. United States,** 344 U.S. 604 (1953). Conversely, the actions of a conspirator should not bind the co-conspirator if they are performed before the conspiracy has begun. If no conspiracy was in existence, the actions could not have been in furtherance of a conspiracy. Carried to its only reasonable conclusion, those same acts could not, after the fact, be attributable to the Petitioner in order to place venue within the district.

The facts in the case at bar present a matter of first impression to the court, even though numerous cases have addressed the issue of a conspirator's liability for actions of co-conspirators which took place prior to his joining an already existing conspiracy. Inconsistent results have been reached in those cases. Many courts have concluded that an individual is responsible for acts done in furtherance of the conspiracy both prior to and subsequent to his joining the conspiracy. **United States v. Bridgeman,** 523 F.2d 1099 (D.C. Cir. 1975); **United States v. Knight,** 416 F.2d 1181 (9th Cir. 1969); **Hernandez v. United States,** 300 F.2d 114 (9th Cir. 1962); **United States v. Guillette,** 547 F.2d 743 (2nd Cir. 1976); **United States v. Brown,** 495 F.2d 593 (1st Cir. 1974); **United States v. Lester,** 282 F.2d 750 (3rd Cir. 1960); **United States v. Wilson,** 500 F.2d 715 (5th Cir. 1974). Other courts have reached the contrary result. **United States v. Peraino** 645 F.2d 548 (6th Cir. 1981); **United States v. Durades,** 607 F.2d 818 (9th Cir. 1979).

The **Durades** Court held that the defendant was not a conspirator at the time the overt act which

gave rise to venue was committed and reversed his conviction. The **Peraino** Court reversed the trial court conviction because the proof indicated that the venue setting action occurred before the defendant joined the conspiracy.

While it is recognized that certiorari is rarely granted, these inconsistent lower federal court decisions mandate direction from this Court. Furthermore, the issue presented in this case is one of fundamental and critical importance to the proper administration of justice in the federal system and presents a unique ruling that departs so drastically from accepted procedural standards as to justify invoking this Court's consideration.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

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Appendix

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jim NICOLL, Defendant-Appellant.
No. 80-7363.

United States Court of Appeals,
Fifth Circuit.
Unit B

January 7, 1982

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, KRAVITCH and ANDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

Appellant Jim Nicoll was convicted by a jury of conspiracy to possess and distribute a controlled substance in violation of 21 U.S.C. § 846. On appeal he contends: 1) that venue was improper, 2) that the trial court erred in admitting statements of a co-conspirator, 3) that the evidence was insufficient to sustain his conviction, 4) that he was entrapped as a matter of law, and 5) that his withdrawal from the conspiracy prohibited his conviction. We reject these contentions and affirm the conviction.

I. Background

On August 2, 1978, Frank Ader contacted the Atlanta Drug Enforcement Agency (DEA) with information concerning drug transactions in the Atlanta area. Ader implicated one James Henry in a conspiracy to acquire and distribute cocaine, and at the urging of DEA special agent Melvin Smith, Ader contacted Henry about possible cocaine deals. In a series of telephone conversations, Henry indicated interest in purchasing large quantities of cocaine for buyers in Dallas, Texas and elsewhere. Ader and Henry agreed to meet in an Atlanta restaurant to work out the details of the transaction.

On August 6, Ader and DEA agent Tyrone Yarn met Henry as agreed, and Henry inquired if Yarn's "organization" could deliver ten kilograms of cocaine per week. Toward the end of the meeting, Henry told Ader to call Jim Nicoll in Dallas to make final arrangements for the cocaine delivery, and wrote Nicoll's home and business telephone numbers on the back of a business card.[1] Henry agreed to call Nicoll and tell him to expect Ader's call.

The following day, DEA agent Smith called Nicoll at the business number supplied by Henry. Smith introduced himself as an "associate" of Ader's, and Nicoll acknowledged that Henry had contacted him to tell him to expect Ader's call. Smith and Nicoll then launched into a lengthy discussion on the details of the cocaine transaction. Nicoll insisted on a sample, which the DEA could not provide. Nevertheless, Smith and Nicoll had several other phone conversations between August and September in an

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1. Henry worked for Nicoll's business, Aloeshine, Inc., in Dallas.

attempt to work out the deal. The negotiations culminated in a meeting among Nicoll, Kathy Seeka (introduced as friend who knew a lot about cocaine), Smith, and DEA agent Gloria Woods, but the proposed deal fell through because of Smith's refusal to provide a sample. Smith had further conversations with Nicoll and Seeka attempting to salvage the deal, but finally on December 18 Nicoll backed out, stating the negotiations were taking too much of his time.

Subsequently, Nicoll, Seeka, and Henry were indicted on drug conspiracy charges. Henry moved for dismissal on double jeopardy grounds, and his trial was severed. Seeka managed to avoid arrest and was still at large at the time of Nicoll's trial. Nicoll was tried twice: the first prosecution ended in a mistrial; the second resulted in his conviction.

II.
Venue

Appellant asserts that venue in the Northern District of Georgia is improper and therefore the conviction must be reversed. According to appellant, the only overt acts occurring in the Northern District involved Henry; if Henry is acquitted in his separate trial,[2] no overt act of the conspiracy will have occurred in the district, thus making venue improper.

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2. At the time of oral argument, Henry's double jeopardy claim was pending appeal in this court, and counsel for Nicoll argued that a dismissal of Henry's prosecution would also make Nicoll's trial venue improper. Henry's double jeopardy claim, however, has now been decided adversely to him, *United States v. Henry*, 661 F.2d 894, at 898 (5th Cir. 1981).

[1,2] We find this argument without merit. For a crime such as conspiracy, which by its nature can be "committed" in a number of places, *United States v. Cooper,* 606 F.2d 96, 97 (5th Cir. 1979), *cert. denied,* 444 U.S. 1024, 100 S.Ct. 685, 62 L.Ed. 2d 657 (1980), venue is proper in any district in which the government shows by a preponderance of the evidence that either the agreement or an overt act occurred. *United States v. DeLeon,* 641 F.2d 330, 336 (5th Cir. 1981). *See* 18 U.S.C. § 3237 (regulating venue for offenses begun in one district and completed in another.) Here the government's evidence showed that co-conspirator Henry engaged in several telephone conversations within the Northern District of Georgia concerning the acquisition of cocaine, and met with DEA agents in an Atlanta restaurant to work out the details of the delivery. The possible acquittal of Henry at some future date would reflect only on his personal guilt beyond a reasonable doubt and not on whether the government proved, by a preponderance, that an overt act of the conspiracy occurred in the Northern District.

III.
Co-Conspirator's Statements

Appellant asserts that the trial court erred in admitting certain statements by Henry tending to implicate Nicoll in the cocaine conspiracy. Appellant argues that the trial court should have held a "*James* hearing" prior to admitting the hearsay statement, and that the government failed to show by a preponderance of the independent evidence that Henry and Nicoll were involved in the same conspiracy. Appellant also argues that even if the government laid the proper predicate for admissi-

bility under the co-conspirator's hearsay exception, one tape of a conversation between Henry and the DEA is inadmissible because of a gap in the conversation.

[3] We reject appellant's arguments. In *United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), the court delineated the standards applicable to the admission of co-conspirator's statements under Fed.R.Evid. 104(b) and 801(d)(2)(e). To admit the statements initially, the trial court must find by substantial independent evidence that a conspiracy existed, that the statements were made in furtherance of the conspiracy, and that the declarant and defendant were members of the conspiracy. *Id.* at 580-81. Upon proper motion at the close of all the evidence, the trial court must review the evidence and conclude that the government has shown the three predicates to admission by a preponderance. *Id.* at 582-83. *See United States v. Gray,* 659 F.2d 1296, at 1301 (5th Cir. 1981).

[4] In *James,* the court indicated that the preferred order of proof was for the government to establish the conspiracy and the connection of the defendant and declarant with it prior to offering the statements as evidence. *James, supra,* at 582. This statement led many trial judges to conduct a "*James* hearing" outside the presence of the jury to develop the conspiracy evidence before admitting any co-conspirators' statements. We have never mandated such a hearing, however, and in fact the *James* court noted that the order of proof was discretionary with the trial judge. *Id.* Our only concern in these cases was that the trial judge become familiar with the evidence of the conspiracy prior to admitting

the co-conspirators' statements, and therefore avoid a wasteful mistrial in the event inadequate evidence was produced. *See United States v. Ricks,* 639 F.2d 1305, 1309 (5th Cir. 1981). Here the trial judge had already heard the government's evidence in the prior prosecution of Nicoll that ended in a mistrial. We agree with the trial court that under the circumstances a "*James* hearing" would have wasted the court's time.

[5] Nor do we find that the government failed adequately to prove the predicate elements for the admission of Henry's statements. Appellant contends that the evidence aside from the statements is insufficient to connect Nicoll and Henry in a cocaine conspiracy. The independent evidence, however, included several phone calls between Nicoll and DEA agents that implicated Henry in the conspiracy. In the first phone call between DEA agent Smith and Nicoll, Nicoll acknowledged that Henry had called to tell him to expect such a call. Nicoll then launched into a long discussion with Smith about the details of the cocaine deal, leaving the inexorable inference that Henry's call had informed him of the pending cocaine transaction.[3] Henry's

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3. In relevant part, the conversation was as follows:
Mel: Yes, I'm trying to contact a Mr. Jim Nicoll.
[DEA Agent Smith]
Jim: Speaking.
[Nicoll]
Mel: Mr. Nicoll, I'm an associate of Mr. Ader's.
Jim: Yes.
Mel: I had a conversation yesterday with Mr. Henry. I believe he's an associate of yours.
Jim. That's correct.
Mel: Yes, we were discussing some business propositions which could possibly be of some benefit to both of us, and there were a few particulars which were giving us

both a degree of difficulty which he suggested that I might directly talk over with you and that we could possibly negotiate both to a happy end.

Jim: Okay, hold on one second and let me go on my other phone.

Mel: Okay, real fine.

Jim: Be right back.

Jim: Okay, what did you say your name was?

Mel: I am an associate of Frank Ader.

Jim: Oh, yeah, okay.

Mel: Okay. The problem is we were encountering, have you spoke to Mr. Henry?

Jim: Yeah, he called me and told me that Mr. Ader was going to call me.

Mel: Yes, Uh-huh. Mr. Ader would have waited as long as he could and I said I would speak to you directly and the problem is Mr. Ader comes highly recommended but I have not had any contact with you in the past.

Jim: That's correct. Excuse me one more moment please. My other phone. I'm gonna have to tell my secretary to hold my calls.

Mel: All right.

Jim: Okay, I'm sorry.

Mel: No, but as I was stating, we could, I do, I'm a little apprehensive about it. It's just there were some of the ways that Mr. Henry wanted this to be negotiated which caused me some concern, and the concern, of course, being over the availability of the funds and to make sure of the sincerity of your part of this, uh. Like I said, it's all going on the word of Mr. Ader. Mr. A is well aware of our capabilities and he has actually seen our finished product and knows of the amount of production of the product we can get out.

Jim: And what kind of percentage is that?

Mel: Well, to be quite truthful with you, it depends upon what you're going to pay for what you get.

Jim: Well, what's available? Let me put it that way.

Mel: If it's okay for you to talk on that phone.

Jim: Everything is cool here.

* * * * * *

Jim: Oh, I understand that. No, here's the thing, I have money people and I can occasionally come up with some money, all right, but I have some people in the market right now. How can I get just a taste to present?

Mel: Okay. I would, I had suggested that the first transaction be done this way. First, I would like Mr. Ader or my representative to meet with you in some place which is a very neutral type of location, a banking institution or something, or a professional office building, or something like this where I feel Mr. Ader or my representative would be quite safe and they could observe the sum of money in your presence in a neutral location where I feel that my individuals will be able to go in there, enter and leave and you will feel quite secure having your funds there and my people will feel quite secure proceeding there. After seeing the funds, I will then send you a sample of the goods. I would then like, after you approve of the sample, for the funds to be placed some place in a neutral situation with control over by one of your people and one of my people. Mr. Henry was greatly opposed to having two signatures on something actually in a legal banking institution. I do not like these motel rooms type of situation with the money in the suitcase under the bed with the two gunsels sitting around. I do not like that. There is nothing wrong with putting money in a bank with signatures on the money. One of your signatures and Mr. Ader's signature, one of my representatives. I will send you the sample; if you like the sample, I will then send you the whole package. At that time, you are to, once you get the package and you see that it's the same as the sample, you are to release the money with my representative there and the other. It has to be at a legal place where there can be no problems. After the first time, I will have no qualms about bringing you what you want if you say you have the funds. It's just I have the skepticism when people start speaking 60, 80, 90 150 thousand dollars and I have no proof of the fact that you have this and I don't know of you. Mr: Henry is a close associate of Mr. Ader. Mr. Ader has seen what I have. There is no law against hav-

ing money, but there is a law against having my product.

Jim: That's right.

Mel: So I would prefer it to be done that way. I can't see where there is any problem with that.

Jim: I see no problem. None at all.

Mel: We can set that up. I have a trip coming up to California in the next couple of days. Temporarily I'm sitting on quite a committed portion. I would like to get an idea of what you want, approximately when you want it. I will give you a delivery date. I will be there. I will be prompt. My people will be there. They will be prompt. I would like to know the banking institution, how it will be done, the signatures on it or whatever, a dual signature. It would be delivered to you, if you like keep it, if not send it back and don't touch it and take your money back out and we'll call it a day. I think that's a very admirable way of doing it.

Jim: Yes, it is. It certainly is. I'm not opposed to that at all.

Mel: Mr. Henry was opposed to it. He wanted the old motel situation.

Jim: Well, he's an old-fashioned fellow.

Mel: That's not the way to do business this day and age with this much money.

Jim: Yes, okay, here's the thing, I'm going out of town tomorrow morning and I won't be back here until probably Thursday of next week.

Mel: That makes it very convenient.

Jim: Okay, so I can't, probably won't be able to contact my people till than and then it will take a few days to get up some of my people. And so, I guess it would be best for you to contact me unless you have a place that I can contact you.

Mel: I prefer to contact you at this point.

* * * * * *

Jim: Okay, that sounds right. Don't see anything wrong with that at all.

Mel: Okay, we shall do it. I'll just call you in about a week or so and I will tentatively hold two for you, that's about the least I will drop down and if there is that type of business, then it's worth my while to do it and I think you'll be very pleased with my product.

Jim: Okay, let me just get with my people and I'll be awaiting to hear from you on Monday the 14th.

conduit for negotiations about the deal.[4] Although Henry and Nicoll were associates in an unrelated legitimate business, and mere association with a person involved in a conspiracy is insufficient to prove participation in the conspiracy, *United States v. Horton* 646 F.2d 181, 185 (5th Cir. 1981), the

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Mel: Okay. Mr. Nicoll, one other point. Mr. Henry provided me with another number. Is that a safe number to give you a call in the evenings, let's say if it were the evening after the 14th if I were tied up during the day?
Jim: 348 number.
Mel: Yes.
Jim: Yes, that's cool.
Mel: Real fine. I should be in contact with you.
Jim: Thank you.
Mel: Take care.

4. On August 21, 1978, for example, the following exchange between Nicoll and Smith occurred:

Nicoll: Oh, we're gonna do some business. It's just that I can't be rushed into these things.
Smith: No. I can't either. It was just that, you know.
Nicoll: Well, I know ... You see what happened prior to your talking to Mr. Henry I had, my man was standing by and we got blowed out on another thing that we tried to set and, of course, then I spent eight days traveling around the country trying to put that together and it didn't happen. Now my man was a little upset, which I don't blame him.
Smith: I have no problem in saying that I will supply someone with something. I will just do it.
Nicoll: I understand that.
Smith: Really no problem. We'll stay in contact through possibly Mr. Henry or something and we'll keep you in mind. There's, in every week or week and half or so, we're always having something to accommodate individuals without a problem usually.
Nicoll: Wonderful.

telephone conversations between Smith and Nicoll indicated that more than simply a business relationship existed between Nicoll and Henry; we conclude that these conversations provided proof by a preponderance that a conspiracy existed and Nicoll and Henry were connected with it. *See Horton, supra,* at 184-85 (orders by one conspirator for a third party to pay large amounts of cash to a second conspirator permitted inferring agreement to defraud Federal Government and provided basis for admitting co-conspirator's statements); *United States v. Atkins,* 618 F.2d 366, 368-70 (5th Cir. 1980) taped conversations between defendant and co-conspirator, though using "veiled language and Delphic references" provided adequate basis for admission of co-conspirator's statements).

[6] Finally, we do not agree that the trial court abused its direction in admitting a tape of a conversation between Henry and the DEA despite a short gap in the tape. In *United States v. Greenfield,* 574 F.2d 305 (5th Cir.), *cert. denied,* 439 U.S. 860, 99 S.Ct. 178 58 L.Ed.2d 168 (1978), the court held that tapes that contained inaudible portions were nevertheless admissible unless the inaudible portions were "so substantial as to render the recording as a whole untrustworthy." *Id.* at 307, quoting *United States v. Avila,* 443 F.2d 792, 795 (5th Cir.), *cert. denied,* 404 U.S. 944, 92 S.Ct. 295, 30 L.Ed. 2d 258 (1971). Here DEA agent Smith testified that no one had tampered with the recording or deleted any portions of it; rather, the short gap of approximately one minute resulted from the tape reaching the end of one side and needing to be turned over. The resulting gap hardly rendered the tape as a whole untrustworthy, and no error resulted from its admission.

IV.
Entrapment and Police Misconduct

[7,8] Appellant urges that his conviction cannot stand because either he was entrapped as a matter of law, or alternatively, the misconduct of the DEA was so egregious that it violated appellant's due process rights. We reject both arguments. The law of this circuit requires that to assert the defense of entrapment, the defendent must admit he committed the acts on which the prosecution is predicated. *E. g. United States v. Brooks,* 611 F.2d 614, 618 (5th Cir. 1980). Nicoll's defense throughout the case was that he only wished to "lead on" the DEA in the hope of getting a small sample of cocaine for his personal use, and specifically denied an intent to distribute cocaine as charged in the indictment. Having failed to assert entrapment as a defense at trial, Nicoll cannot now raise it on appeal.

[9] Nor was the conduct of the DEA so egregious as to violate due process. For his due process argument appellant relies primarily on *United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978). In *Twigg* the court reversed the conviction of a defendant charged with drug conspiracy on due process grounds in light of the egregious conduct of DEA agents in the case. The evidence in *Twigg,* however, showed that the DEA had not only set up the drug operation (a laboratory for the production of "speed") but also had chosen the site, provided indispensable raw materials for the operation, and directed the operation through an informant.[5] In contrast, here

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5. As summarized by the Third Circuit:

> At the behest of the Drug Enforcement Agency, Kubica,

the DEA essentially only initiated contact with Nicoll, who then actively negotiated the cocaine deal. Thus while we recognize that cases may arise in which the government's conduct is so egregious as to violate due process, *see generally Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) (Powell, J., concurring); *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), the conduct of the DEA in this case does not fall within that category.

V.
Withdrawal

[10] Appellant also contends that if a conspiracy

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a convicted felon striving to reduce the severity of his sentence, communicated with Neville and suggested the establishment of a speed laboratory. The Government gratuitously supplied about 20 percent of the glassware and the indispensable ingredient, phenyl-2-propanone. It is unclear whether the parties had the means or the money to obtain the chemical on their own. The DEA made arrangements with chemical supply houses to facilitate the purchase of the rest of the materials. Kubica, operating under the business name "Chem Kleen" supplied by the DEA, actually purchased all of the supplies with the exception of a separatory funnel. (The funnel was secured by Twigg at the direction of Kubica who was engaged in operating the laboratory.) When problems were encountered in locating an adequate production site, the Government found the solution by providing an isolated farm-house well-suited for the location of an illegally operated laboratory. Again, there was no cost to the defendants. At all times during the production process. Kubica was completely in charge and furnished all of the laboratory expertise. Neither defendant had the know-how with which to actually manufacture methamphetamine. The assistance they provided was minimal and then at the specific direction of Kubica. *United States v. Twigg,* 588 F.2d at 380-81.

existed, he withdrew from it in a phone conversation with the DEA in December, 1978, and that therefore his conviction cannot stand. This argument is specious. While we have serious doubts whether Nicoll's statements in the December conversation constituted withdrawal under the precedents of this court,[6] even assuming Nicoll withdrew, the withdrawal came too late to avoid liability for the conspiracy. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Ianelli v. United States,* 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975). *See United States v. Wilson,* 657 F.2d 755, at 758 (5th Cir. 1981); *United States v. Winter,* 509 F.2d 975, 982 (5th Cir.), *cert. denied,* 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975). Whether the object of the conspiracy is achieved is therefore immaterial to the commission of the crime of conspiracy.

[11,12] Although under the general federal conspiracy statute, 18 U.S.C. § 371, a conspiracy conviction requires proof of an overt act by one of the participants, *e. g., United States v. Wieschenberg,* 604 F.2d 326, 335, (5th Cir. 1979), the rule in this circuit is that a conviction for a drug conspiracy under 21 U.S.C. § 846 does not require proof of an overt act in furtherance of the conspiracy. *E. g.,*

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6. To prove withdrawal, a conspirator must show he acted affirmatively to defeat or disavow the purpose of the conspiracy. *E. g., United States v. Killian,* 639 F.2d 206, 209 (5th Cir. 1981). In the December phone call, Nicoll stated to DEA agent Smith that he "had had it" with the negotiations and was tired of spending so much time trying to work a deal. Although the conversation indicates Nicoll was postponing any further negotiations at the time, it does not necessarily indicate Nicoll "affirmatively disavowed" the conspiracy.

Wilson, supra; United States v. Garcia, 655 F.2d 59, 62 (5th Cir. 1981). *See United States v. Baker*, 609 F.2d 134, 138 (5th Cir. 1980) (no overt act required for conspiracy to import under 21 U.S.C. § 963). No Fifth Circuit case specifically has considered whether the no-overt-act rule for drug conspiracies precludes withdrawal after consummation of the agreement but before commission of an overt act. Our cases have held, however, that withdrawal is impossible once an overt act is committed.[7] *E. g., United States v. Heathington*, 545 F.2d 972, 973 (5th Cir. 1977). *See United States v. Jiminez*, 622 F.2d 753, 757-58 (5th Cir. 1980) (approving instruction that defendant could not withdraw after commission of an overt act).

[13] We need not decide in this case whether withdrawal from a drug conspiracy is possible prior to the commission of an overt act but after consummation of the agreement, because Nicoll's alleged withdrawal came after his meeting in Dallas with DEA agents. This meeting for the purpose of settling the details of the cocaine transaction constituted an overt act in furtherance of the conspiracy; hence, Nicoll's withdrawal, if it occurred at all, came too late to absolve him of criminal liability.

VI.
Sufficiency of the Evidence

[14,15] Appellant's final assertion is that the

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7. Withdrawal may be an issue even after an overt act has occurred, however, if the defendant's claim is that withdrawal precludes liability for acts occurring *after* the withdrawal. *See, e. g., United States v. Killian*, 639 F.2d 206, 208 (5th Cir. 1981); *United States v. Bradsby*, 628 F.2d 901, 905 (5th Cir. 1980). Such an assertion of withdrawal nevertheless does not affect the defendant's liability for the conspiracy and any acts occurring *prior to* the alleged withdrawal.

evidence was insufficient to sustain the jury verdict. The test for reviewing sufficiency claims is whether, viewing the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), substantial evidence exists to support the verdict. *Hamling v. United States,* 418 U.S. 87, 124, 94 S.Ct. 2887, 2911, 41 L.Ed.2d 590 (1974) quoting *Glasser, supra,* 315 U.S. at 80, 62 S.Ct. at 469; *United States v. Berry,* 644 F.2d 1034, 1039 (5th Cir. 1981). Our precedents have interpreted the "Substantial evidence" test as evidence that would permit a reasonable jury to find guilt beyond a reasonable doubt, *United States v. Fox,* 613 F.2d 99, 101 (5th Cir. 1980), or, alternatively, evidence such that a reasonable jury could conclude was inconsistent with every reasonable hypothesis of innocence. *Berry, supra,* at 1039; *United States v. Gray,* 659 F.2d 1296, at 1302 (5th Cir. 1981). The evidence in the case before us included telephone conversations between Nicoll and DEA agents concerning the details of the cocaine purchase during which Nicoll stated he was acting as "middleman" for unspecified buyers in Dallas and elsewhere, and a meeting in Dallas among Nicoll, Seeka, and DEA agents to attempt to arrange delivery of the cocaine. We find the evidence ample to sustain the verdict.

AFFIRMED.

Opposition

No. 81-1911

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JIM NICOLL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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JIM NICOLL, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that venue for his conspiracy prosecution was improper because it was based upon an overt act committed by a co-conspirator before petitioner became a member of the conspiracy.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiracy to possess cocaine, in violation of 21 U.S.C. 846, and was sentenced to two years' imprisonment to be followed by a special parole term of three years.[1] The court of appeals affirmed (Pet. App. 15-30).

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[1]The special parole term is not authorized by law for a conspiracy conviction under Section 846. *Bifulco* v. *United States*, 447 U.S. 381 (1980). Petitioner may move in the district court pursuant to Fed. R. Crim. P. 35 to correct his sentence.

1. The evidence at trial, the sufficiency of which is not challenged here (see Pet. 9), established that petitioner conspired with James Henry and a woman identified as Kathy Seeka to buy cocaine from an undercover agent of the Drug Enforcement Administration.[2]

On August 2, 1978, Frank Ader, an informant, told DEA agents in Atlanta, Georgia, about Henry's involvement in a conspiracy to purchase and distribute cocaine. Ader then telephoned Henry to discuss a proposed sale of cocaine to Henry and his associates in Dallas, Texas. Henry requested a sample to take to Dallas, but Ader refused. Henry then agreed to call his "man" in Dallas (later identified as petitioner) in order to make arrangements for the purchase. Ader and Henry also agreed to meet after those arrangements had been made (R.A. 6: 89-106).[3]

On the evening of August 9, Henry met with Ader and an undercover DEA agent in an Atlanta restaurant. After supplying petitioner's home and business telephone numbers in Dallas, Henry promised to telephone petitioner and to alert him that Ader would be telephoning (R.A. 7: 3-11). The next day, the undercover agent telephoned petitioner and introduced himself as an associate of Ader. Petitioner acknowledged that Henry had told him to expect Ader's call. Petitioner and the agent then began a lengthy discussion about the details of the cocaine transaction (R.A. 6: 56-79). After numerous telephone conversations during the next two and one half months, the undercover agent met

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[2]Seeka has never been apprehended. Henry's trial was severed after he appealed an order of the district court refusing to dismiss the indictment on double jeopardy grounds. The court of appeals affirmed, and this Court denied certiorari. *United States* v. *Henry*, 661 F. 2d 894 (5th Cir. 1981), cert. denied, No. 81-6080 (Mar. 1, 1982).

[3]"R.A." refers to the record on appeal.

with petitioner and Seeka. After much negotiation, however, the proposed cocaine deal fell through (Pet. App. 17).

2. Petitioner contends (Pet. 9-14) that venue in the Northern District of Georgia was improper because the overt act upon which venue was based—the August 9 meeting attended by Henry, Ader, and the DEA agent—was committed before petitioner became a member of the conspiracy. This claim was not raised in the court of appeals,[4] is based upon facts contrary to those proved at trial, and is legally unsound.

Petitioner states (Pet. 12) that "[t]he only evidence regarding the formation of a conspiracy resulted from petitioner's acknowledgment of having had a phone conversation with Henry [on August 10,] the day following Henry's meeting with the agents." In fact, however, the evidence established that petitioner joined the conspiracy prior to the August 9 meeting. In their telephone conversations held a week before that meeting took place, Henry asked Ader for a sample of cocaine to take to his associates in Dallas (R.A. 6: 104). When Ader declined, Henry suggested that Ader fly to Dallas for a meeting with his "man" (R.A. 6: 106). Henry repeatedly referred to himself and his contact as "the two of us," and he stated that he would telephone "my man in Dallas" to set something up (R.A. 6: 107, 110). Finally, at the meeting on August 9, Henry said that he would introduce Ader to "some of his buyers" and requested that Ader fly to Dallas to meet "his contact" (R.A. 7: 8-9). Henry then gave Ader petitioner's home and business telephone numbers and asked Ader to call petitioner to make arrangements for

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[4]In the court of appeals, petitioner contended only that venue in the Northern District of Georgia would be improper if co-defendant Henry was acquitted (Br. for Appellant 41-42). The court of appeals properly rejected that claim (Pet. App. 17-18).

the cocaine purchase (R.A. 7: 10). This evidence was sufficient to establish that petitioner had already joined the conspiracy to possess cocaine when the August 9 meeting took place.

Moreover, petitioner has cited no authority supporting his contention that venue in a case such as this may not be predicated upon overt acts committed before he joined the conspiracy. While conceding (Pet. 13) that "[m]any courts" have held to the contrary, petitioner relies upon *United States* v. *Peraino*, 645 F. 2d 548 (6th Cir. 1981), and *United States* v. *Durades*, 607 F. 2d 818 (9th Cir. 1979). Those cases, however, are clearly inapposite. *Peraino* is limited to prosecutions for conspiracy to distribute obscene materials (see 645 F. 2d at 551), because in such cases the choice of venue may affect the "community standards" applied in determining whether the materials are obscene. See *Hamling* v. *United States*, 418 U.S. 87, 104-107 (1974). *Durades* concerned an entirely different issue, *i.e.*, whether a variance between the indictment and the evidence at trial required reversal of a defendant's conviction. The indictment charged a single conspiracy but the evidence proved two separate conspiracies. The defendant was involved in only one of the conspiracies, and venue was predicated solely upon acts committed in furtherance of the other conspiracy. The court held that the variance was fatal because it affected the venue of the prosecution. Thus in *Durades*, unlike the present case, no overt act was committed at any time in the district of venue in furtherance of the conspiracy with which the defendant was connected.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

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